TENAGA NASIONAL BHD

v.

KESANG TRADING SDN BHD & ORS

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[CIVIL SUIT NO: 22-53-96]
18 JUNE 2002

LIMITATION: *Contract - Fraud - Withholding information regarding transfer of property - Whether amounted to fraudulent concealment - Whether limitation period only commenced upon discovery of fraud - Whether action time-barred - Limitation Act 1953, ss. 6, 29(b)*

EQUITY: *Defences - Estoppel - Whether defendant's conduct unconscionable and unmeritorious - Whether defendant estopped from asserting limitation to defeat plaintiff's case*

This was an application under O. 14A of the Rules of the High Court 1980 seeking to determine on point of law whether the plaintiff's action was time-barred under the Limitation Act 1953 ('the Act'). The defendant contended that the plaintiff's action was time-barred by virtue of s. 6 of the Act as the plaintiff's cause of action accrued on 19 June 1988, whereas the plaintiff's action was filed on 20 October 1996, approximately two years and four months after limitation had set in. The plaintiff however argued that as a result of fraudulent concealment by the first defendant and by virtue of s. 29(b) of the Act, the limitation period was postponed to 14 September 1991 (when the plaintiff discovered the fraud); thus, the action was still within the six-year limitation period.

Held:

[1] The plaintiff, being the purchaser without knowledge of the fraud, was entitled to rely on the good faith of the first defendant being the seller of the property to act in accordance with the terms of the contract. Unfortunately, the first defendant chose to be silent and did nothing to perform its part of the contract. Therefore, the withholding of information from the plaintiff regarding the transfer of the property to the second defendant amounted to a fraudulent concealment on the part of the first defendant. Thus, the plaintiff was protected by s. 29(b) of the Act. (p 204 g-h)

[2] The first defendant was guilty of unconscionable and unmeritorious conduct and by applying the doctrine of estoppel, the first defendant was estopped from relying on s. 6 or for that matter, any of the provisions of the Act, as it would be inequitable and unjust to permit the first defendant to assert limitation against the plaintiff to defeat the plaintiff's case. (p 205 a-c)

[Judgment for the plaintiff.]

Case(s) referred to:
Alfred Templeton & Ors v. Low Yat Holding Sdn Bhd & Anor [1989] 2 MLJ 202 ***(refd)***
Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 ***(refd)***
Beaman v. Arts Ltd [1949] I All ER 465 ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham (Executor of the Estate of Loo Cheng Ghee) [1998] 4 CLJ 812 ***(refd)***
Sia Siew Hong v. Lim Gim Chian [1996] 3 CLJ 26 ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6, 29(a), (b)
Rules of the High Court 1980, O. 14A

Limitation Act 1939 (UK), s. 26(a), (b)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, p 413
Chong Yeow Choy, *Law of Limitation*, Butterworths Asia, 1995, p 113

For the plaintiff - Goh Peng Hong (Bakar & Partners)
For the 1st defendant - Lucy Tan (Mohamed Ismail & Co)

Reported by Suresh Nathan

JUDGMENT

Nik Hashim J:

The Application

The parties have agreed to resolve the issue of limitation that arises in this action by making an application under O. 14A of the Rules of the High Court 1980 seeking for the determination of this court on point of law whether the plaintiff's action is time-barred under the Limitation Act 1953 ('the Act'); and the parties have also agreed that in the event the plaintiff's action is time-barred, the plaintiff's action will be dismissed with costs, and if it is not, then judgment will be entered for the plaintiff as prayed.

On 17 December 1986 the plaintiff (the purchaser) and the 1st defendant (the vendor), Kesang Trading Sdn Bhd together with Kesang Housing Sdn Bhd

(the proprietor) entered into a sale and purchase agreement in respect of a property held under Geran No. 8414, No. Lot 213, Pekan Jertih, Daerah Besut, Terengganu together with a double storey shop house thereon (the property) for a price of RM220,000. At all material times, the plaintiff had carried out its contractual obligation by making payments totalling RM198,000 as at 4 December 1986 in accordance with the terms of the agreement. On 19 June 1988, without the knowledge of the plaintiff, the proprietor transferred the property into the name of Tanjung Indah Sdn Bhd (the 2nd defendant). On 14 September 1991 the plaintiff entered a private caveat on the said property. Thereafter, at about five years later, ie, on 20 October 1996, the plaintiff filed the present action against the 1st defendant claiming among other things, the return of RM198,000 with interest and costs.

The Contentions Of The Parties

The 1st defendant contends that the plaintiff's action is time-barred by virtue of s. 6 of the Act which bars an action based on contract to be brought after the expiration of six years from the date on which the cause of action accrued. It is contended that the plaintiff's cause of action accrued on 19 June 1988 which is the date on which the proprietor transferred the property into the name of the 2nd defendant. The six-year period within which the plaintiff should have filed its action therefore expired on 18 June 1994. On that ground alone, it is alleged that the plaintiff's claim, which the 1st defendant claims was a simple breach of contract, ought to be dismissed as the claim was only filed on 20 October 1996, approximately two years and four months after limitation had set in.

The plaintiff, on the other hand, argues that the 1st defendant's failure to keep the plaintiff informed of the transfer of the property to the 2nd defendant constitutes a fraudulent concealment within the purview of s. 29(b) of the Act that justifies the postponement of limitation period, which the plaintiff claims does not begin to run until the plaintiff discovered the fraud on 14 September 1991 when the plaintiff entered a private caveat on the said property. Since the action was filed on 20 October 1996, the plaintiff contends that its action is still within the six-year limitation period.

The Law

Section 29 of the Act states:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) ...,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Section 29(b) in particular, was inserted to protect a plaintiff who was ignorant of his right of action in the case of fraudulent concealment, and to overcome the difficulty that time would otherwise be running against him, unknown to him. (see *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69).

Halsbury's Laws of England, 4th edn at p. 413 states:

> Fraudulent concealment has been defined in relation to an action to recover property, as designed fraud by which a person, knowing to whom the right belongs, conceals the circumstances giving the right, and by means of that concealment enables himself or some other person to enter and hold property.
>
> It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act gives rise to the right of action is performed.
>
> "Fraud" does not necessarily imply moral turpitude; it is enough if the conduct of the defendant or his agent is so unconscionable that it would be inequitable to allow him to rely on the limitation period.

A very liberal interpretation was given to the term 'fraud' in s. 26(b) of the English Limitation Act 1939 by the English courts. This section is in *pari materia* with s. 29(b) of the Act. Associate Professor Chong Yeow Choy in *Law of Limitation*, Butterworths Asia 1995 at p. 113 pointed out that "a plaintiff who is unable to bring his case within s. 29(a) will still succeed in defeating the defence of limitation by bringing the case within s. 29(b). The learned author referred to the case of *Beaman v. Arts Ltd* [1949] 1 All ER 465 where the Court of Appeal held that the case did not fall within the ambit of s. 26(a) of the 1939 Act, it was nevertheless willing to accept that the plaintiff's right of action had been fraudulently concealed within s. 26(b). Although the defendants in that case had taken no positive step to hide the existence of the cause of action from the plaintiff, the Court of Appeal in *Beaman* was concerned, the notion of fraud in s. 26(b) extended to any case where the defendant may be said to have acted dishonestly or unconscionably, and this included the situation where the wrongful act was committed surreptitiously. The fact that (1) the defendants made no attempt to obtain the plaintiff's instruction before disposing of her property for their own convenience; (2) the defendants were in breach of the confidence imposed on

them; and (3) the defendants did not inform the plaintiff of what they had done at any time thereafter, constituted a reckless 'concealment by fraud' of the right of action within s. 26(b)."

Besides, the doctrine of estoppel is also relevant to this case. It has been held by the Court of Appeal that the doctrine of estoppel, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon the provisions of the Act that would defeat his opponent's case (see *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham (Executor of the Estate of Loo Cheng Ghee)* [1998] 4 CLJ 812; *Sia Siew Hong v. Lim Gim Chian* [1996] 3 CLJ 26).

Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v. Low Yat Holding Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Act.

The Findings Of The Court

Reverting to the facts of the case, it is noted from the sale and purchase agreement in respect of the property, that the person who signed on behalf of the 1st defendant, Kesang Trading Sdn Bhd and the proprietor, Kesang Housing Sdn Bhd, was the same person, Wong Siew Yin. Therefore, the 1st defendant, being closely related to the 2nd defendant, not only in their names which are almost similar, but also in their staff, Wong Siew Yin, though the two companies are two different entities, could not be heard to say that the transfer of the property to the 2nd defendant was executed without its knowledge. Taking into account the relationship between the plaintiff and the 1st defendant, as the purchaser and the seller of the property respectively, together with the fact that the 1st defendant had received the contractual sum, the burden lies upon the 1st defendant to ensure that the transfer of the property is carried out at such appointed time. Indeed, the 1st defendant owed a duty to inform the plaintiff in the event that its part of the contractual bargain becomes impossible to perform. As such, the plaintiff had not failed to act with reasonable diligence to discover the fraud on 14 September 1991, ie, three years after the fraud had been committed. The plaintiff, being the purchaser unknown of the fraud, was entitled to rely on the good faith of the 1st defendant being the seller of the property to act in accordance with the terms of the contract. But unfortunately, the 1st defendant chose to be silent and did nothing to perform its part of the contract. Therefore, the withholding of information from the plaintiff regarding the transfer of the property to the 2nd defendant, amounts to fraudulent concealment on the part of the 1st defendant. Thus, s. 29(b) of the Act is applicable and hence, the plaintiff was protected by the section.

In this regard, I, with respect, agree with the plaintiff's counsel that the plaintiff, as an innocent and ignorant purchaser, had been deceived by the 1st defendant into executing the agreement without receiving any consideration for the money paid. The 1st defendant's refusal to return 90% of the purchase price for the purchase of the property (which is now impossible) would undoubtedly constitute an unconscionable and unmeritorious act. The 1st defendant is thus guilty of such conduct. This court cannot condone such a patent fraudulent and dishonest act of the 1st defendant.

Moreover, by the doctrine of estoppel, the 1st defendant is estopped from relying on s. 6 or for that matter, any of the provisions of the Act, to defeat the plaintiff's case. The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. Thus, applying the doctrine to the facts of the present case, I hold that it would be inequitable and unjust to permit the 1st defendant to assert limitation against the plaintiff to defeat the plaintiff's case.

In conclusion, I hold that the plaintiff's action is not time-barred. As such, I give judgment to the plaintiff as prayed in the statement of claim with costs, and the claim for the damages will be assessed by the registrar.